(2)

No. 00-0171

Supreme Court, U.S.
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In The

Supreme Court of the United States

CAROL LAWRENCE,

Petitioner,

v.

THE CURATORS OF THE UNIVERSITY OF MISSOURI,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The United States Court of Appeals for the Eighth Circuit affirmed the District Court's order granting summary judgment for Respondent on Petitioner's Title VII gender discrimination claim on the ground that Petitioner had failed to offer evidence sufficient to allow a reasonable jury to infer that the Respondent's legitimate nondiscriminatory reason for denying Petitioner tenure was pretextual.

Does the Eighth Circuit's opinion conflict with this Court's subsequent decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 68 U.S.L.W. 4480 (June 12, 2000)?

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STATEMENT OF THE CASE

This case arose when the University of Missouri denied Carol Lawrence's application for promotion and tenure because of her weak research record. Disclaiming that this was the University's true reason for refusing her tenure, Lawrence filed suit alleging she was a victim of gender discrimination. Finding that Lawrence failed to offer sufficient evidence from which a jury could reasonably infer that the reason offered by the University for denying her tenure was pretextual, the District Court granted the University's summary judgment motion, and the Eighth Circuit affirmed that order. Contrary to Lawrence's assertion that the question before this Court is whether a judge or jury should resolve "substantive factual disputes," the true question is a more preliminary one – whether Lawrence presented evidence sufficient to create a substantive factual dispute as to whether the University's reason for denying her tenure was pretextual.

Candidates for tenure at the University must demonstrate achievement in three areas: teaching, research, and service. The University's published tenure guidelines, which were in effect at the time of Lawrence's hire, consider quality research to be a crucial element in the tenure decision. Specifically, these guidelines apprise the tenure candidate of the necessity to offer evidence of effective and sustained published research with the warning that "[q]uantity can be a consideration but quality

must be the primary one." (App. 236-37).[1] Guidelines governing Lawrence's application for tenure as a professor in the University's School of Accountancy also instructed Lawrence that the "most convincing evidence" of quality research is publication of research results in "refereed journals of high quality." (App. 225). Although these tenure guidelines set out the standards by which tenure decisions are made, these same guidelines also caution the applicant that the "mere achievement of a minimum standard in no way guarantees either tenure or promotion." (App. 226).

In addition to the published guidelines, Lawrence received annual evaluations during the six-year period prior to her tenure application which also advised her of the importance of high quality research. In her first performance evaluation, Lawrence was urged by the evaluation committee to develop an ongoing inventory of four or five active research projects to ensure that she would "ultimately accumulate at least five or six publications in reputable academic journals (the apparent *minimum* research requirement today)" by the time she applied for tenure. (App. 241) (emphasis added). Two years later, Lawrence's evaluators noted that she had published only one article, based upon her doctoral dissertation, and urged her to place a high priority on research in the next few years so that she could publish in quality publications. The next year, Lawrence's evaluation emphasized

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[1] Where actual quotations from the record below are used, citations to *Appellant's Appendix* filed with the Eighth Circuit are noted as "App." References to the Appendices found in the *Petition for Writ of Certiorari* are noted as "Pet. App."

the evaluation committee's increasing concern with her failure to publish in quality journals. Lawrence's last pre-tenure evaluation again raised the concern with her research record, cautioning her that "it must be acknowledged that tenure decisions often focus on research that has been published or formally accepted for publication in top quality journals." (App. 246).

In her 1994 tenure application, Lawrence's research included the sole-authored article published in 1990 based on her dissertation, one co-authored article published in 1993, three co-authored articles published in 1994, two co-authored articles which had not yet been published, and one conditionally-accepted co-authored article which had not yet been published. Not one of these articles was published in one of the seven accounting journals rated by Lawrence's peers as a top-ranked or "A+" journal; two of Lawrence's articles were published in *Research in Governmental and Nonprofit Accounting* ("*RIGNA*"), a publication rated as a second-tier or "A" journal by the School of Accountancy "several years" before Lawrence applied for tenure. (App. 258, 324). Although Lawrence had not published in a top-ranked journal at the time of her application, she identified in her application four of the seven top-ranked journals as target publications for work she had in progress.

As part of her tenure application, Lawrence was required to submit her research to six peers outside the University who either taught or practiced in her field. Four of the six outside reviewers openly criticized Lawrence's publication record. Dr. James M. Patton, a former co-editor of *RIGNA*, specifically noted that "[o]ne feature of Professor Lawrence's research record that deserves

further investigation is the quality of the journals in which she has published. *To date she has no publications in the very top tier accounting journals.*" (App. 298, 317) (emphasis added). A professor from the Wharton School of the University of Pennsylvania noted "two potential limitations to her record: (i) the number of publication is somewhat small and (ii) none of the papers are published in the top-tier accounting journals." (App. 318). Dr. Grace Pownall, an accounting professor at the Emory School of Business, stated that "[t]he biggest weakness in Carol's vita is its lack of first-tier publications." (App. 321). An accounting professor from Boston University voiced his concern about the quality of Lawrence's research by stating in his review letter that "[t]he more serious concern would be with her large number of co-authored publications." (App. 323). These letters were incorporated into Lawrence's application for tenure before it was reviewed by the University.

The review of Lawrence's tenure application began with four of the seven School of Accountancy's tenured faculty voting against recommending Lawrence for tenure. The Chair of the Tenure Committee, Dr. Earl Wilson, explained in a memorandum the department's vote, citing as the reasons for the negative recommendation Lawrence's failure to publish in top-quality journals and the slow development of her research program. Noting the same concerns, the Director of the School of Accountancy decided to recommend against granting Lawrence's application for tenure. In response to these two negative recommendations, Lawrence submitted a rebuttal letter, incorporated with her tenure application, in which she acknowledged that publication in a top-ranked journal

was a "valid goal" and one she hoped "to meet in the near future," but denied that such a requirement was contained in the tenure standards. (App. 263). A committee composed of a faculty member from each of the five departments within the College of Business & Public Administration provided the next level of review for Lawrence's tenure application. This five-member committee voted unanimously against recommending Lawrence for promotion and tenure because of her failure to publish in top-quality journals. Next, the Dean of the College of Business & Public Administration reviewed Lawrence's application. The Dean noted Lawrence's failure to publish in "any journals that were clearly recognized as being among the best in the accountancy field" and recommended against granting Lawrence tenure. (App. 63-64, 255).

A campus-wide committee then reviewed Lawrence's tenure application and gave Lawrence her only positive recommendation for tenure. The head of the campus committee, Dr. Charlotte Parker, has testified, however, that no committee member had expertise in Lawrence's area of research, nor was any member knowledgeable about the quality of journals which had published Lawrence's articles. Based on Lawrence's concerns, the campus committee did discuss the possibility of gender discrimination or unfair treatment by the University, but according to Parker, the committee discovered no such evidence. Because of the positive vote by the campus committee, Dr. Brady Deaton, serving as interim Provost, carefully reviewed Lawrence's dossier, independently contacted

outside persons in the accounting field, read one of Lawrence's published articles, and met with Lawrence, Parker, the School of Accountancy Director, School of Accountancy professors, and the Dean and Associate Dean of the College of Business & Public Administration. Deaton also reviewed Lawrence's tenure application, including the written rebuttal letter prepared by Lawrence. Deaton's approach in reviewing Lawrence's application was to give Lawrence the "benefit of the doubt" in all instances. (App. 96).

Following Deaton's investigation, he suggested a possible one-year delay of Lawrence's tenure application to gain "a more accurate understanding of her long term contribution to the profession." (App. 547). Deaton concluded, however, that he would "find it difficult to argue with the assessment of the department and division that the quality of this record is not sufficient for promotion and tenure at this time." (App. 79-80, 547, 586-87). In reviewing Lawrence's tenure application, Deaton specifically investigated whether gender discrimination influenced the denial of her tenure application and determined that it had not. Relying on Deaton's recommendation, the newly-appointed Provost, Dr. Edward Sheridan, subsequently recommended against granting Lawrence's application for promotion and tenure. The University's Chancellor conducted the final formal evaluation of Lawrence's tenure application. In his independent review of Lawrence's entire tenure application, the Chancellor viewed four of the six outside review letters as negative and concluded that Lawrence's research record did not merit an award of tenure.

Following the Chancellor's decision, Lawrence appealed the denial of her application to the Provost. Although Provost Sheridan had initially relied on the advice of Deaton in denying Lawrence's application, Sheridan then conducted an independent review of Lawrence's entire dossier for purposes of reconsidering Lawrence's application. In his review, Sheridan particularly observed the concerns raised by the outside reviewers about Lawrence's failure to publish in top publications. Sheridan, experienced in the review of tenure applications, considered the criticisms raised by the outside reviewers to be "killer lines" – lines that the reviewers wrote with the understanding that they would harm the candidate. (App. 666-67). Sheridan concluded that the outside review letters were very weak endorsements of Lawrence and gave that conclusion substantial weight in his review. Because he determined that Lawrence failed to establish a research record worthy of tenure, Sheridan denied Lawrence's appeal.

Lawrence has offered no evidence that any University decisionmaker made any statement which even suggested gender bias. Lacking any direct evidence of gender discrimination, Lawrence based her claim on her assertion that similarly-situated males were treated more favorably. Dr. Inder Khurana was the only other professor in the School of Accountancy who applied for promotion and tenure in the same year as Lawrence. At the time he submitted his tenure application, Khurana had published two articles in top-tier or "A+" accounting journals. Khurana had published nine other articles and had an additional two articles under review by accounting journals. Khurana received unanimous endorsements at every level of review by the University and was awarded tenure.

Lawrence admits that Khurana's research record was superior to hers and that he deserved tenure. (App. 175, 182-83).

Dr. Vairam Arunachalam, a male who applied for tenure two years after Lawrence, was also granted tenure following unanimous recommendations at every level. Arunachalam's research record included 16 published articles with two of the articles appearing in "A+" journals. Outside review letters written on behalf of Arunachalam commented that his research record was "among the strongest" ever seen for a tenure candidate, his research was on the "cutting edge" in his field, and his research made him "one of the rising stars in the field of accounting information systems." (App. 389-400).

Dr. Robin Roberts submitted his promotion and tenure application the year before Lawrence's application. Although Roberts withdrew his application prior to its review by the Provost, he received favorable recommendations for tenure during the earlier stages of review. As support for her claim of discrimination, Lawrence asserts that University decisionmakers viewed Roberts' publication in *RIGNA* more favorably than her own publication in that journal. Even if Roberts were considered a similarly-situated male for comparison with Lawrence, his *RIGNA* publication was only one of his publication efforts which supported his tenure application. In addition to the *RIGNA* article, Roberts published one co-authored article and one sole-authored article in two "A+" ranked journals. Further, Roberts' outside review letters complimented him on his publication record in these top journals, commenting that his research represented a "significant contribution" to his field. (App. 523-33).

In response to the directive of Supreme Court Rule 15, the University must point out a mischaracterization of the facts in Lawrence's Petition. Lawrence asserts that *RIGNA* was characterized as a "top research journal" by the "male Chair of the Tenure Committee [Dr. Wilson] that turned Lawrence down" in his own application for promotion. Dr. Wilson's application, however, is not part of the record. The only evidence in the record regarding Dr. Wilson's promotion application is found in Lawrence's rebuttal letter. Assuming Lawrence's quotation of Dr. Wilson's application to be accurate, Dr. Wilson does not characterize *RIGNA* as a "top research journal." Rather, he states that the journal "enjoys a reputation for high quality for a relatively new journal." (App. 258). This view was apparently shared by others at the time the School of Accountancy faculty ranked *RIGNA* as an "A" journal along with 20 other journals which formed the second-tier below the seven top-ranked or "A+" journals. (App. 324).

Whether Lawrence had provided sufficient evidence from which a reasonable jury could infer that the reason given by the University to deny her tenure was false was the dispositive issue on summary judgment. The District Court, finding facts in the record that provided "a reasonable basis for the conclusion that Lawrence's publication record did not meet the standards," concluded that "the facts that Lawrence argues demonstrate that she had a strong research record show little more than 'a mere dispute over her qualifications for the position,' and those facts are not sufficient by themselves to raise a genuine issue of material fact on the issue of pretext." (Pet. App. C at A30). Reviewing the District Court's grant

of summary judgment de novo, the Eighth Circuit agreed with the District Court's analysis, finding "no substantial evidence in the record tending to show the Curators' decision for denying Lawrence's application for promotion and tenure" was pretextual and affirming in a *per curiam* opinion "for the reasons stated" in the District Court's opinion. (Pet. App. B at A2-A3).

REASONS WHY THE WRIT SHOULD BE DENIED

Lawrence's Petition for Writ of Certiorari mischaracterizes the decisions below as conflicting with this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 68 U.S.L.W. 4480 (June 12, 2000), which held that an employee who has presented sufficient evidence to reject the employer's legitimate explanation need not introduce additional independent evidence of discrimination to defeat summary judgment. *Reeves* only helps Lawrence if she has produced sufficient evidence to reject the University's legitimate explanation for denying her tenure. She has not, so *Reeves* does not mandate the granting of certiorari. Moreover, the District Court opinion clearly applies the legal standards of *Reeves* and of this Court's prior decisions with regard to Lawrence's evidentiary burden and how the evidence is to be considered when ruling on summary judgment. Because the decisions of the Eighth Circuit and the District Court were proper in all respects, the University respectfully urges this Honorable Court to deny Lawrence's Petition for Writ of Certiorari.

I. The Court of Appeals' Decision Does Not Conflict With This Court's Decision in *Reeves v. Sanderson Plumbing Products, Inc.*

The Eighth Circuit, as this Court recognized again in *Reeves*, has refused to require a discrimination plaintiff to provide additional independent evidence of discrimination over and above sufficient evidence showing that the employer's legitimate nondiscriminatory reason was false in order to survive summary judgment on the issue of pretext. See *Reeves*, 68 U.S.L.W. at 4481 (citing *Gaworski v. ITT Commercial Fin. Corp.*, 17 F.3d 1104 (8th Cir. 1994), for the proposition that a prima facie case, combined with sufficient evidence to disbelieve the employer's explanation, always creates a jury issue of whether an employer intentionally discriminated); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) (referring to the Eighth Circuit's opinion below when stating, "[t]hus rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is required.' "); see also *Williams v. Valentec Kisco, Inc.*, 964 F.2d 723, 728 (8th Cir. 1992) (noting its own rejection – even before the *Hicks* decision – of the "pretext-plus" theory in age discrimination cases). Consequently, even if the Eighth Circuit and the District Court had been faced with this issue in the University's summary judgment motion, its decision, no doubt, would have applied law consistent with this Court's decision in *Reeves*.[2]

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[2] In her attempt to portray the Eighth Circuit as a court that has ignored this Court's decision in *Reeves*, Lawrence points to

However, the issue in *Reeves* – whether additional independent evidence of discrimination was required to

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"forty-one summary judgment appeals involving employment discrimination cases" in which the Eighth Circuit has given "scant recognition" to the decision. *Petition for Writ of Certiorari* at 5 n.3. Actually, Lawrence cites forty-four cases, but these cases – many not involving summary judgment – do not present the dire situation that Lawrence describes.

Sixteen of these cases do not even involve claims of employment discrimination. See *Kennell v. Gates*, 215 F.3d 825 (8th Cir. 2000) (civil rights); *Armstrong v. Todd A. Mandell & Assoc., L.L.C.*, No. 00-1470 (8th Cir. June 15, 2000) (civil rights); *Norbeck v. Basin Elec. Power Coop.*, 215 F.3d 848 (8th Cir. 2000) (False Claims Act); *Stewart v. Pafford Ambulance Serv., Inc.*, No. 99-2993 (8th Cir. June 22, 2000) (Fair Labor Standards Act); *Walls v. Noel*, No. 00-1152 (8th Cir. June 29, 2000) (civil rights); *Vincent Fast Horse v. Waterbury*, No. 99-1165 (8th Cir. June 29, 2000) (civil rights); *Friedman v. City of Jacksonville*, No. 99-3662 (8th Cir. June 29, 2000) (civil rights); *Walker v. Arkansas State Hosp.*, Nos. 99-4001, 00-1351 (8th Cir. June 29, 2000) (civil rights); *White v. Rogers*, No. 99-4231 (8th Cir. June 29, 2000) (civil rights); *Applequist v. KATV*, No. 99-4210 (8th Cir. July 3, 2000) (civil rights); *McAlphin v. Morgan*, 216 F.3d 680 (8th Cir. 2000) (civil rights); *Armstrong v. United States*, No. 00-1843 (8th Cir. July 12, 2000) (civil rights); *Hogrefe v. Nebraska*, No. 00-1554 (8th Cir. July 12, 2000) (civil rights); *Sidles v. Nebraska Court of Appeals*, No. 00-2033 (8th Cir. July 17, 2000) (civil rights); *Hammond v. Northland Counseling Ctr., Inc.*, 218 F.3d 886 (8th Cir. 2000) (False Claims Act); *Sandhill, Inc. v. City of Springfield, Missouri*, No. 99-3660 (8th Cir. July 21, 2000) (Fair Housing Act and civil rights).

An additional thirteen cases cited by Lawrence, though employment discrimination cases, clearly do not involve appellate review of the issue of pretext. See *Jackson v. United Parcel Serv.*, No. 99-2591 (8th Cir. June 14, 2000); *Henderson v. Simmons Foods, Inc.*, 217 F.3d 612 (8th Cir. 2000); *Doumouras v. Northwest Airlines, Inc.*, 215 F.3d 852 (8th Cir. 2000); *Hocevar v. Purdue Frederick Co.*, 216 F.3d 745 (8th Cir. 2000); *Stuart v. General*

defeat summary judgment – was *not* the issue decided below. Lawrence lost on summary judgment because the

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Motors Corp., 217 F.3d 621 (8th Cir. 2000); *Bailey v. Anchor Packaging, Inc.*, 216 F.3d 270 (8th Cir. 2000); *Boersig v. Union Elec. Co.*, No. 99-2699 (8th Cir. July 6, 2000); *Price v. McDonnell Douglas Corp.*, No. 99-2925 (8th Cir. July 6, 2000); *Gassoway v. Metropolitan St. Louis Psychiatric Ctr.*, No. 99-3030 (8th Cir. July 10, 2000); *Stekloff v. St. John's Mercy Health Sys.*, 218 F.3d 858 (8th Cir. 2000); *Peterson v. Apfel*, Nos. 99-2760, 99-4302 (8th Cir. July 17, 2000); *Waddell v. Univ. of Minnesota*, No. 99-3120 (8th Cir. July 19, 2000); *McCabe v. Independent Sch. Dist. No. 625*, No. 99-2617 (8th Cir. July 20, 2000). Furthermore, it is unclear in five other cases whether the issue of pretext was even reviewed by the court. See *Tokuhoshi v. Tension Envelope Co.*, No. 99-1742 (8th Cir. June 12, 2000); *Crayton v. Cardinal Bldg. Materials, Inc.*, No. 99-2650 (8th Cir. June 29, 2000); *Simat v. Chi-Chi's, Inc.*, No. 99-2805 (8th Cir. June 29, 2000); *Wallace v. Ellisville Health Care Ctr.*, No. 99-3755 (8th Cir. July 3, 2000); *Graham v. Rosemount, Inc.*, No. 99-2634 (8th Cir. July 12, 2000).

Only eight of the cases cited by Lawrence involved employment discrimination cases in which review by the Eighth Circuit included review of the issue of pretext in the context of summary judgment. See *Buettner v. Arch Coal Sales Co., Inc.*, 216 F.3d 707 (8th Cir. 2000); *Griffin v. Super Valu*, No. 99-2330 (8th Cir. July 14, 2000); *Parish v. Gateway 2000, Inc.*, No. 99-3561 (8th Cir. July 14, 2000); *Nyameke v. Curators of the Univ. of Missouri-Rolla*, No. 98-3750 (8th Cir. July 18, 2000); *Taylor v. QHG of Springdale, Inc.*, No. 99-4207 (8th Cir. July 18, 2000); *Ellett v. Big Red Keno, Inc.*, Nos. 98-3046, 98-3694 (8th Cir. July 21, 2000); *Mizell v. Iowa Beef Processors, Inc.*, No. 99-3506 (8th Cir. July 21, 2000); *Calvin v. Yellow Freight Sys., Inc.*, No. 99-3809 (8th Cir. August 3, 2000). Two other employment discrimination cases involving the issue of pretext came to the Eighth Circuit for review after the trial court entered judgment as a matter of law in favor of defendants. See *Phillips v. Union Pac. R.R. Co.*, 216 F.3d 703 (8th Cir. 2000); *Anderson v. Nebraska*, No. 99-3414 (8th Cir. July 20, 2000). While the Eighth Circuit's review in these ten cases is irrelevant to Lawrence's appeal, the observation that

District Court and the Eighth Circuit in its de novo review of the evidence, found that she had failed to offer sufficient evidence from which a jury could infer that the University's reason for denying her tenure was false. In determining whether Lawrence had fulfilled her burden of proof on the issue of pretext, the District Court simply required Lawrence to provide sufficient evidence that the University's proffered explanation for denying her tenure was "unworthy of credence." (Pet. App. C at A27). This Court requires no less of Lawrence. See, e.g., *Reeves*, 68 U.S.L.W. at 4482 ("[T]he plaintiff may attempt to establish that he was the victim of intentional discrimination 'by showing that the employer's proffered explanation is unworthy of credence' ") (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981)). The law applied by the District Court to Lawrence's evidence of pretext in no way conflicts with the law enunciated by this Court in *Reeves*.

Similarly, no conflict with *Reeves* can be found in the scope of evidence the District Court considered before ruling against Lawrence on summary judgment, nor does any conflict arise regarding the inferences drawn by the District Court from that evidence. As *Reeves* makes clear, a court should review all of the evidence in the record and, in so doing, "should give credence to the evidence favoring the nonmovant as well as that *'evidence supporting the moving party that is uncontradicted and unimpeached,*

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only three opinions cite *Reeves* is not surprising in light of the fact that the *Reeves* decision does not conflict with the law as it has been applied by the Eighth Circuit.

at least to the extent that that evidence comes from disinterested witnesses.' " 68 U.S.L.W. at 4484 (citation omitted) (emphasis added). Furthermore, all reasonable inferences from the evidence are to be drawn in favor of the nonmoving party, and *Reeves* prohibits the court from engaging in credibility determinations or weighing the evidence. See *id.* The District Court did not violate any of these principles. Before determining that there were no disputed issues of material fact in the record to prevent its consideration of summary judgment, the District Court recognized its obligation "to view the facts in the light most favorable to the adverse party and to allow the adverse party the benefit of all reasonable inferences to be drawn from the evidence." (Pet. App. C at A15) (citations omitted). Lawrence cannot argue that the District Court stated the law improperly.

What Lawrence argues is that the District Court did not follow that law because it "ignored" her evidence that *RIGNA* was a top journal and this evidence showed that the University's reason for denying her tenure was pretextual. Further, Lawrence charges that the District Court improperly drew all reasonable factual inferences in favor of the University. To support her argument, however, Lawrence emphasizes the following inference *drawn in her favor* by the District Court *from the facts she offered* on the issue of pretext: "As Lawrence points out, there are facts in the record that might have justified the conclusion that she had a strong research record." (Pet. App. C at A30). The District Court, however, did not stop here. In keeping with this Court's direction in *Reeves*, the District Court was obligated to give credence to uncontradicted and unimpeached evidence from disinterested witnesses

which supported the University. This is exactly what the District Court did when it pointed to evidence from one of several outside reviewers who criticized Lawrence's failure to publish in a top-tier journal:

> However, there are also facts in the record that provide a reasonable basis for the conclusion that Lawrence's publication record did not meet the standards of some of her colleagues because of the quality of publications in which her work was published. For example, James M. Patton, one of the outside reviewers selected by Lawrence and a former Co-Editor of RIGNA stated that "[o]ne feature of Professor Lawrence's research record that deserves further investigation is the quality of journals in which she has published or plans to submit to. *To date she has no publications in the very top tier accounting journals.*" Pl's Ex. E, at DEF0071 (emphasis added). Therefore, the facts that Lawrence argues demonstrate that she had a strong research record show little more than "a mere dispute over her qualifications for the position," and those facts are not sufficient by themselves to raise a genuine issue of material fact on the issue of pretext.

(Pet. App. C at A30). Simply put, considering unfavorable evidence that is undisputed and that comes from disinterested witnesses does not mean the District Court ignored Lawrence's evidence, and relying on that same evidence does not mean that the District Court wrongly made a credibility determination or weighed the evidence. The District Court merely fulfilled its obligation to consider *all* uncontroverted evidence in the record and to apply the "substantive evidentiary standard of proof" to that evidence. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242, 252 (1986). That there may have been some evidence in the record favoring plaintiff was not enough to prevent the entry of summary judgment against her. See *id.* ("The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.").

The issue ruled upon by the District Court and the Eighth Circuit was whether Lawrence's evidence of pretext was sufficient to allow a reasonable jury to infer that the reason given by the University for denying her tenure was unworthy of credence. Each of those courts ruled against her, but in so doing, neither faulted Lawrence for failing to offer additional independent evidence of gender discrimination. Further, neither court applied an incorrect evidentiary standard upon which summary judgment was to be determined. As such, the law as applied by the courts below poses no conflict with this Court's decision in *Reeves*, and Lawrence's Petition for Writ of Certiorari should be denied.

II. The Court of Appeals Was Correct in Affirming Summary Judgment in Favor of the University.

In affirming the entry of summary judgment against Lawrence, the Eighth Circuit's review of the record led it to conclude, for the same reasons cited by the District Court, that there was "no substantial evidence in the record tending to show" that the University's reason for denying Lawrence tenure was pretextual. (Pet. App. B at A2-A3). The reasons given by the District Court demonstrate a proper application of the controlling law to the

undisputed material facts before the court and provide yet further justification for denying Lawrence's Petition for Writ of Certiorari.

In its evaluation of pretext in a case involving the denial of tenure by a university, the District Court acknowledged that its role was not to sit in judgment as a "super personnel council" by substituting "its own views concerning the plaintiff's qualifications for those of the properly instituted authorities." (Pet. App. at A27-A28) (citing, respectively, *Kobrin v. Univ. of Minnesota*, 34 F.3d 698, 704 n.4 (8th Cir. 1994), and *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 346 (1st Cir. 1989)). The basis for the District Court's recognition of its proper role can be explained by an earlier case decided by the Eighth Circuit which also involved the denial of tenure: "Our review of a tenure decision is approached with trepidation; a grant of tenure is a significant decision for a college and one that is not made lightly. We do not profess to possess the expertise required to evaluate such decisions for their merit." *Brousard-Norcross v. Augustana College Ass'n*, 935 F.2d 974, 975-76 (8th Cir. 1991). Accordingly, the District Court correctly observed that Lawrence "must show something more than just a dispute over her qualifications for tenure." (Pet. App. C at A28) (citing *Kobrin*, 34 F.3d at 704 n.4).

This is not to say that the inherently subjective aspect of a university's tenure decision prevented the District Court from determining whether the University's reason for denying Lawrence tenure was pretextual. On the contrary, the District Court identified several means by which the University's denial of tenure could be found to be pretextual:

> To prove pretext in the context of a tenure decision, the plaintiff might present facts showing that the reasons for the denial were "obviously weak or implausible." *Brown*, 891 F.2d at 346. Alternatively, the plaintiff might present facts showing that the standards used in making the tenure decision were "manifestly unequally applied." *Id.* However, the facts showing pretext "must be of such strength and quality" to allow a reasonable finder of fact to conclude that the denial of tenure was "obviously" unsupported or that "the university *manifestly* applied an unequal standard to her tenure application." *Id.* (emphasis in original). Finally, "[d]epartures from procedural regularity, *such as a failure to collect all available evidence*, can raise a question as to the good faith of the process where the departure may reasonably affect the decision" and therefore provide a sufficient basis for the reasonable conclusion that the reason given for the decision was pretextual. *Brousard-Norcross*, 935 F.2d at 977 (quoting *Zahorik v. Cornell Univ.*, 729 F.2d 85, 93 (2d Cir. 1984)) (emphasis added in *Brousard-Norcross*).

(Pet. App. C at A28). Because Lawrence failed to offer sufficient evidence from which a jury could reasonably infer that the University's reason for denying her tenure was implausible or that the standards were unequally applied to her, she did not meet her burden of proof, and the District Court properly entered summary judgment in favor of the University.

Evidence offered by Lawrence to suggest that the University's reason for denying her tenure was pretextual focused primarily on the characterization of *RIGNA*, a journal in which Lawrence had published two articles.

Arguing that *RIGNA* was of sufficient quality to justify an award of tenure, Lawrence points to her 1990 annual performance evaluation which referred to her first article published in *RIGNA* as a "good hit," and to a characterization of the journal by Dean Bruce Walker as one of the "top dozen or so research journals." As the District Court properly determined, none of these statements is inconsistent with the fact that the University denied Lawrence tenure because of her failure to publish in a top-tier accounting journal. These distinctions in the characterization of a particular journal, while appearing slight, indeed have significance in the academic world.

In a ranking by School of Accountancy faculty, *RIGNA* was not rated in the top tier of the seven "A+" accounting journals.[3] This perception of *RIGNA* was not unique to the University. As the District Court pointed out, one of Lawrence's outside reviewers, the former co-editor of *RIGNA*, agreed with other outside reviewers who did not recognize *RIGNA* as a top-ranked accounting journal when he wrote, "[t]o date she has no publications in the very top tier accounting journals." (App. 298, 317). Two other outside reviewers also criticized Lawrence's failure to publish in a top-tier journal. In keeping with the *Reeves'* opinion, the District Court was correct in considering uncontroverted evidence from these disinterested witnesses. 68 U.S.L.W. at 4484. The dissenting

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[3] This ranking was submitted by Lawrence with her suggestions opposing summary judgment. Of the two other rankings of journals submitted by Lawrence, one did not even rank *RIGNA* in the top fifty journals; the other ranked it as twenty-eighth. (App. 326-27).

opinion below makes much of the fact that Robin Roberts, a male applicant for tenure, was recognized by Dean Walker for publication in *RIGNA*. (Pet. App. B at A8). The record reveals that Dean Walker did not single out *RIGNA* as "among the top dozen or so research journals in the accounting field." Instead, Dean Walker's comment referred to three journals – two of which were "A+" journals and, therefore, considered more prestigious than *RIGNA*. (App. 491-92). Accordingly, there is no substantive evidence that the University's characterization of *RIGNA* was so inconsistent as to allow a jury to reasonably infer that the reason the University denied Lawrence tenure is unworthy of belief.

Contrary to the view of the dissent below, there was no "eleventh-hour change" in what the requirements for tenure meant or how they were applied. Despite Lawrence's contention that she had been told she only was required to publish five or six articles in order to be awarded tenure, her first annual performance review explicitly identified this requirement to be "the apparent *minimum* research requirement today," and the tenure standards were explicit in warning Lawrence that meeting the minimum standards did not guarantee her an award of tenure. (App. 226, 241) (emphasis added). Consequently, holding Lawrence to a standard that required her to exceed the miminum requirements, according to the District Court, did not support a reasonable inference that the University's denial of tenure was pretextual. (Pet. App. C at A29).

Indeed, courts recognize that qualification for tenure is not the same as the standard for an award of tenure: "[m]ere qualification depends on objective measures – the

terminal degree, the number of publications, and so on," while an award of "[t]enure requires something more." *Namenwirth v. Board of Regents of the Univ. of Wisconsin Sys.*, 769 F.2d 1235, 1242 (7th Cir. 1985). For Lawrence, the "something more" required for an award of tenure also included evidence of top-quality research. From the time Lawrence first became employed by the University in a tenure-track position, she knew that she would need to provide evidence of quality research in order to be awarded tenure. The University's published tenure guidelines in effect at the time of her hire clearly stated that quality research – not quantity – would be a crucial element in her tenure decision. Further, Lawrence's annual performance evaluations, as early as three years before she applied for tenure, cited the importance of developing "quality publications" and the need to obtain "publication in top quality journals." (App. 244, 246).

Lawrence understood this. At the time of her tenure application, Lawrence had not published a single article in a top accounting journal. However, aware of the importance of publishing in the top-tier accounting journals, Lawrence identified four of the top accounting journals as target publications for work she had in progress at the time of her tenure application. Even more telling is Lawrence's admission in her rebuttal letter that publication in a top-ranked journal was a "valid goal," but one she had not yet attained – despite the two articles she had published in *RIGNA*. (App. 263). Deputy Chancellor Brady Deaton, who reviewed Lawrence's tenure application, also understood this requirement. Following his investigation, Deaton concluded that the quality of Lawrence's research record was not sufficient for promotion

and tenure. In defending the sufficiency of her evidence on pretext at the summary judgment stage, Lawrence cannot rely on only some of Deaton's statements regarding her qualification for tenure and ignore the uncontroverted statements made by Deaton which support the University's position. As *Reeves* reminds her, Lawrence must live with all of the undisputed facts in the record.

In determining that Lawrence had failed to offer sufficient facts from which a reasonable jury could infer that the University's denial of tenure was pretextual, the District Court also observed that Lawrence had failed to offer facts showing "that male applicants were granted tenure for meeting only the minimum requirements." (Pet. App. C at A29). It is undisputed that Khurana, Arunachalam, and Roberts all had at least one publication in a clearly-recognized, top-tier accounting journal and that they were judged by the disinterested outside reviewers and University decisionmakers on whether they had published in these top journals. Even the alleged inconsistency in how the co-authored articles were viewed in Lawrence's record as compared to Roberts' record does not suggest that the tenure standards were unequally applied to Lawrence; rather, the criticism by University decisionmakers of Lawrence's research record mirror the criticisms made by disinterested outside reviewers regarding Lawrence's record. In the end, a comparison of Lawrence's research record with the research records of similarly-situated male applicants led the District Court to conclude that there were sufficient facts in the record to support the determination reached by the University – that those applications were "worthy of tenure while Lawrence's was not." (Pet. App.

C at A31). Because Lawrence failed to bear her burden of proof on the issue of pretext, the Eighth Circuit properly affirmed the District Court's entry of summary judgment in favor of the University.

CONCLUSION

Lawrence has failed to demonstrate that her case presents any question which justifies its plenary review by this Court or remand to the Eighth Circuit for reconsideration. The decisions below present no conflict with this Court's holding in *Reeves v. Sanderson Plumbing Products, Inc.*, 68 U.S.L.W. 4480 (June 12, 2000), and the Eighth Circuit and the District Court properly applied law consistent with *Reeves* and its precedent. Moreover, the Eighth Circuit and the District Court correctly decided that Lawrence had failed to offer sufficient evidence from which a jury could reasonably infer that the University's reason for denying her tenure was a pretext for gender discrimination.

For these reasons, Lawrence's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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